

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

WILLIAM HARRISON ALSTON,)	
Plaintiff,)	C.A. 05-168 Erie
)	
v.)	
)	District Judge McLaughlin
DEBRA FORSYTH, et al.,)	Magistrate Judge Baxter
Defendants.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the instant *pro se* civil rights action be dismissed for Plaintiff's failure to prosecute

II. REPORT

On May 13, 2010, the Third Circuit Court of Appeals issued an opinion vacating District Judge Sean J. McLaughlin's Order to dismiss this case based upon its finding that Plaintiff "had no meaningful opportunity to present arguments or evidence in opposition to" Defendants' argument that the Third Circuit's decision in Ward v. LaManna, 334 Fed. Appx.. 487 (3d Cir. 2009), is dispositive of Plaintiff's claims in this case. (ECF No. 79 at p. 6). Accordingly, the Third Circuit remanded the case to this Court, stating that "[t]o the extent [Plaintiff] wishes to present arguments and evidence in opposition to the decisive summary judgment issue, the District Court should consider them in the first instance." (Id. at p. 7).

In accordance with the Third Circuit Court's directive, this Court issued an Order on June 28, 2010, requiring Plaintiff to file, on or before July 19, 2010, a sur-reply to Defendants' reply brief that was filed on July 1, 2009. [ECF No. 81]. Plaintiff appealed this Court's Order to District Judge Sean J. McLaughlin. [ECF No. 82]. On January 19, 2011, Judge McLaughlin issued an Order granting Plaintiff's appeal and vacating this Court's Order of June 28, 2010.

[ECF No. 88]. In his Order, Judge McLaughlin granted Plaintiff a 120-day period to conduct discovery in support of his claims, after which Plaintiff was ordered to file his sur-reply to Defendants' reply brief [ECF No. 68] on or before June 20, 2011. This deadline has long since expired and Plaintiff has still not filed a sur-reply, despite the substantial allowance of time that has been granted to him.

The United States Court of Appeals for the Third Circuit has set out a six-factor balancing test to guide a court in determining whether dismissal of a case is appropriate. Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984). The court must consider: 1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or attorney was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and 6) the meritoriousness of the claim or defense. Id. at 868. Not all of the six factors need to weigh in favor of dismissal before dismissal is warranted. Hicks v. Feeney, 850 F.2d 152 (3d Cir. 1988).

Applying the Poulis factors to the present matter, this Court recommends the dismissal of this matter. Since the remand of this matter from the Third Circuit Court of Appeals, Plaintiff has taken none of the necessary steps to prosecute this case, and has failed to comply with the District Court's Order. Plaintiff is proceeding *pro se* and therefore bears all of the responsibility for any failure in the prosecution of his claims. Alternative sanctions, such as monetary penalties, are inappropriate with indigent parties.

III CONCLUSION

For the foregoing reasons, it is respectfully recommended that this case be dismissed due to Plaintiff's failure to prosecute.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(A), and Rule 72(a) of the Federal Rules of Civil Procedure, the parties are allowed fourteen (14) days from the date

of service to file an appeal from this order to the District Court. Failure to timely file an appeal may constitute a waiver of some appellate rights. See Nara v. Frank, 488 F.3d 187 (3d Cir. 2007).

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: August 8, 2011

cc: The Honorable Sean J. McLaughlin
United States District Judge